The Enforcement of Intra-EU BIT Awards: *Micula v Romania* and Beyond

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**Abstract:**

The European Commission and a number of EU Member States have long disputed the compatibility of intra-EU BITs with EU law. As illustrated by the *Micula v Romania* proceedings, where an investor seeks to enforce an intra-EU BIT award, which is seen as being in conflict with EU law, this can raise questions as to the extent to which an enforcing court should take this kind of conflict into account. The present contribution systematically analyses this issue with regard to both ICSID and non-ICSID awards, differentiating between enforcement proceedings within and outside of the EU. It concludes that within the EU even the enforcement of ICSID awards cannot be entirely taken for granted where such enforcement would lead to the violation of a fundamental provision of EU law.
1 Introduction

Bilateral Investment Treaties between EU Member States (intra-EU BITs) have been around for well over a decade, ever since the enlargement of the EU by the predominantly Eastern-European Member States in May 2004.1 Different views as to the extent to which these treaties can be reconciled with EU law have existed for almost as long.2

On the one hand, many arbitrators consider that there is no fundamental conflict between intra-EU BITs and EU law3 or at least do not think that any such conflict should affect the jurisdiction of a tribunal established on the basis of an intra-EU BIT. As a consequence, investors have been able to successfully sue EU States for damages in arbitrations based on intra-EU BITs in a number of cases. On the other hand, some EU Member States and the European Commission have taken the view that intra-EU BITs are per se irreconcilable with EU law and that there should not be any arbitrations based on those treaties.4

What is more, where a conflict between a BIT and EU law exists, the European courts and institutions must be expected to assess the consequences of such a conflict from a perspective that is different from the perspective of an arbitral tribunal.5 An arbitral tribunal will first and foremost apply the treaty invoked by the investor, and any conflicts between the norms contained in that treaty and the European treaties will have to be resolved in accordance with the relevant principles of international law.6 In particular, from the perspective of a treaty-based tribunal, EU law can only be relevant to the extent where international law so provides.7

By contrast, the courts of an EU Member State and the ECJ must be expected to treat EU law as an autonomous legal order,8 the application of which takes precedence over the application of both national laws and international law as between EU Member States. Unlike arbitral tribunals, when these forums are faced with a conflict between an intra-EU BIT and EU law, they are likely to give effect to the principle of supremacy of EU law and try to resolve any conflicts with international law in accordance with the rules prescribed by EU law itself.9 These

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1 Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia became Members of the EU with effect from 1 May 2004. Since then Bulgaria, Romania, and Croatia have also joined the EU, bringing the total number of intra-EU BITs to approximately 190.


3 See eg Binder v Czech Republic, UNCITRAL, Award on Jurisdiction (6 June 2007) para 63; Jan Oostergetel and Theodora Laurentius v Slovak Republic, UNCITRAL, Decision on Jurisdiction (30 April 2010) para 87.


5 See also Electrabel SA v Republic of Hungary, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) paras 4.112, 4.117; Christian Tietje and Clemens Wackernagel, ‘Enforcement of intra-EU BITs and EU law’ (2016) 16 Journal of World Investment & Trade 205, 207. See already Wehland (n 2) 300.

6 See also European American Investment Bank AG (EURAM) v Slovak Republic, UNCITRAL, Award on Jurisdiction (22 October 2012) para 73. Some tribunals have limited themselves to consider EU law ‘as a fact’, see AES Summit Generation Limited and AES-Tisza Erőmű Kft v Republic of Hungary, ICSID Case No ARB/07/22, Award (23 September 2010) para 7.6.6.

7 In addition, EU law can potentially be relevant as part of the domestic law of the host State (eg regarding the question of what property rights have arisen in the first place) and as the law of the lex loci arbitri if the arbitration is seated in an EU Member State; see eg Euroko BV v Slovak Republic, UNCITRAL, PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension (20 October 2010) para 225.

8 See Case C-6/64 Costa v ENEL [1964] ECR 585.

9 See the argument of the European Commission in Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania, ICSID Case No ARB/05/20, Award (11 December 2013) para 334.
different perspectives mean that, even if everybody were to agree that there is a conflict between intra-EU BITs and EU law, the relevance and consequences of such a conflict might not be assessed in the same manner by arbitral tribunals and the judicial institutions within the EU.  

All this can lead to a situation where an EU State against which an award has been rendered on the basis of an intra-EU BIT resists payment with the argument that EU law prevents it from paying the award. Even where the State is willing to pay the award, the European Commission might seek to prevent it from doing so, again on the basis that payment would be a violation of EU law. In either case, if the award is not paid voluntarily, the investor will likely try to enforce it, either in the courts of the respondent State, or in another EU Member State, or in the courts of a State outside of the EU. \footnote{See already Wehland (n 2) 301. See also Tietje/Wackernagel (n 5) 208.}

The procedural difficulties that can arise in these scenarios are well illustrated by the various proceedings subsequent to the rendering of an award in ICSID Case No. ARB/05/20, Micula v Romania in December 2013. At the origin of this case was the investment made by two brothers of Swedish nationality, Ioan and Viorel Micula, and three companies that they controlled, in the food production sector in Romania in the 1990s. \footnote{‘Enforcement’ in this contribution is used in a broad sense, including the recognition of an award as a necessary first step to enforcing it, but short of matters that relate more narrowly to the execution into specific assets.}

According to the claimants, at the time of investing they relied on a legislative incentives regime that Romania had put in place to attract foreign investment by granting investors exemptions from customs duties and profit tax. \footnote{Micula v Romania (n 9) para 133.} The claimants contended that Romania had committed itself to keeping these incentives in place until at least 2009. \footnote{Micula v Romania (n 9) paras 137-172.}

Romania revoked the incentives in August 2004, \footnote{Micula v Romania (n 9) para 253.} alleging that doing so was necessary to conform with EU law requirements on State aid in the context of preparing Romania’s accession to the EU. \footnote{Same as already Wehland (n 2) 301.} In 2005, the Micula brothers and their companies started ICSID proceedings against Romania based on the Romania-Sweden BIT, arguing that the revocation of the incentives regime constituted a breach of their rights under that treaty. \footnote{Micula v Romania (n 9) para 241.} The European Commission intervened in those proceedings as an amicus curiae to support Romania’s argument that withdrawing the incentives was required by EU law and contending that, if the tribunal were to award damages to the claimants, such an award would constitute illegal State aid under Article 107(1) of the TFEU and could not be implemented. \footnote{Micula v Romania (n 9) para 245.} This notwithstanding, the tribunal held in a final award that, by revoking the incentives, Romania had failed to accord the claimants fair and equitable treatment, and awarded the claimants damages of approximately 180 million EUR. \footnote{Micula v Romania (n 9) para 256.}

The rendering of this award in favour of the Micula brothers in turn led to the initiation of several new proceedings, involving the claimants, Romania, and the

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\footnote{See already Wehland (n 2) 301. See also Tietje/Wackernagel (n 5) 208.\footnote{Micula v Romania (n 9) para 133.} \footnote{Micula v Romania (n 9) paras 137-172.} \footnote{Micula v Romania (n 9) para 253.} \footnote{Same as already Wehland (n 2) 301.} \footnote{Micula v Romania (n 9) para 241.} \footnote{Micula v Romania (n 9) para 245.} \footnote{Micula v Romania (n 9) para 256.} \footnote{Micula v Romania (n 9) para 335. Article 107(1) TFEU states: ‘Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.’} \footnote{Micula v Romania (n 9) para 1329.}
European Commission, in relation to the payment, enforcement and annulment of the award.

First, at the level of Romanian domestic law, in early 2014 Romania offset taxes owed by one of the claimants to the State in an amount of approximately 80 million EUR against part of the award. Around the same time, several of the claimants moved to enforce the award in Romania, and successfully applied to a Bucharest court of first instance for a decision allowing the execution of the award on the basis of Article 54 of the ICSID Convention. An executor was named and assets worth approximately 10 million EUR were seized from the Romanian Ministry of Finance and distributed to the claimants.

Second, as a consequence of these developments, the European Commission in May 2014 issued an injunction against Romania based on Article 11(1) of Council Regulation (EC) No 659/1999, ordering the State to suspend any payment of the award up to the moment where the Commission would take a final decision on the compatibility of such a payment with the internal market. The Commission subsequently initiated formal State aid proceedings against Romania, and in March 2015 it issued a final decision in those proceedings, finding that payment of the award constituted illegal State aid and ordering Romania not to pay any further sums of the award and to recover any sums already paid. This decision is currently being challenged by the claimants before the General Court of the EU.

Third, in parallel to the above, in April 2014 Romania started annulment proceedings at ICSID under Article 52 of the ICSID Convention and requested that enforcement of the award be stayed pending a decision in those proceedings. The ad hoc annulment committee indicated that it would stay enforcement of the award only if Romania unconditionally committed to paying the award in case the committee

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20 The European Commission’s *amicus* submission before the United States Court of Appeals for the Second Circuit suggests that, in addition to the enforcement proceedings in Romania, the claimants ‘have sought recognition of the Award in Belgium, France, Luxembourg, Romania and the United Kingdom’, but that ‘[o]nly in Belgium and Romania have enforcement proceedings been commenced, with a Belgian court refusing enforcement in deference to the Final Decision’, see European Commission, Brief for Amicus Curiae in United States Court of Appeals for the Second Circuit, Ioan Micula, European Food SA, SC Starmill SRL and Multipack SRL v Romania (4 February 2016) *<www.italaw.com/sites/default/files/case-documents/italaw7096.pdf>* accessed 4 May 2016, 16.


22 See European Commission, Letter to Romania (n 21) para 21; European Commission Decision 2015/1470 (n 4) para 32. See also Ioan Micula, Vasile Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania, ICSID Case No ARB/05/20, Decision on Annulment (26 February 2016) para 70. Romania challenged this decision and the European Commission intervened in the proceedings, suggesting that the decision to execute the award be annulled or, in the alternative, the matter be referred to the ECJ for a preliminary ruling under Article 267 of the TFEU, see European Commission Decision 2015/1470 (n 4) para 33. The challenge and the suggestion to seek a preliminary ruling were rejected, and an appeal against that decision was lodged in January 2015, see European Commission Decision 2015/1470 (n 4) para 36.

23 See European Commission Decision 2015/1470 (n 4) paras 11, 37. The Bucharest Court of Appeal subsequently stayed the enforcement proceedings, and Romania passed a law suspending all enforcement actions and paid the remaining amount into an escrow account in the name of the claimants, from which the claimants would only be able to withdraw the money if the Commission decided that doing so would be compatible with the internal market, see European Commission Decision 2015/1470 (n 4) paras 11, 35, 37; Micula v Romania (n 22) para 73.

24 See European Commission, Letter to Romania (n 21) para 3. This decision had originally been challenged by the claimants before the European General Court, but proceedings were discontinued at the claimants’ request in February 2016, see Case T-694/15, Micula and Others v Commission *<http://curia.europa.eu/juris/liste.jsf?language=en&num=T-694/15>* accessed 4 May 2016.

25 See European Commission, Letter to Romania (n 21).

26 See European Commission Decision 2015/1470 (n 4) Article 2(1). The Commission also decided that the claimants would be liable to repay any amounts received, see European Commission Decision 2015/1470 (n 4) Article 2(2).


were to decide against its application for annulment.\textsuperscript{29} After Romania informed the committee that, in the light of the European Commission’s position that payment would constitute illegal State aid,\textsuperscript{30} it could not make such a commitment,\textsuperscript{31} the ad hoc committee lifted the stay on enforcing the award.\textsuperscript{32} In February 2016, the ICSID ad hoc committee rendered its decision, rejecting Romania’s request for annulment under Article 52 of the ICSID Convention.

\textit{Fourth}, after the stay on enforcing the award had been lifted, the claimants moved to enforce the award in the United States, and in April 2015 the US District Court for the Southern District of New York rendered a decision granting \textit{ex parte} confirmation and conversion of the award into a US judgment.\textsuperscript{33} Romania unsuccessfully tried to convince the District Court to overturn its decision\textsuperscript{34} and has launched an appeal in this regard before the US Court of Appeals for the Second Circuit.\textsuperscript{35} The European Commission has intervened as an \textit{amicus curiae} in both the proceedings before the District Court and the proceedings before the Court of Appeals.

Whilst the focus of the debate in the \textit{Micula} proceedings has been on the compatibility of paying an award with EU provisions on State aid\textsuperscript{36} rather than the question of whether intra-EU BITs are in conformity with EU law and continue to be applicable,\textsuperscript{37} the case provides a good illustration of what may happen procedurally where enforcement is seen as being in conflict with EU law.

To systematically address the issues that can arise in this context, it is necessary to distinguish between ICSID awards on the one hand, and non-ICSID awards on the other. Non-ICSID awards will usually be enforced in accordance with the provisions of the New York Convention, and the grounds for refusing enforcement will be limited to those under Article 5 of the New York Convention. By contrast, ICSID proceedings take place within a system that is in principle self-contained, and where Articles 54 and 55 of the ICSID Convention provide for an enforcement mechanism in relation to pecuniary awards that is different from the provisions regarding recognition and enforcement under the New York Convention. ICSID and non-ICSID awards will therefore in principle be subject to different enforcement regimes.

\textsuperscript{29} See European Commission Decision 2015/1470 (n 4) para 28; \textit{Micula v Romania} (n 22) para 32.
\textsuperscript{30} The European Commission submitted an \textit{amicus curiae} brief in the annulment proceedings in early 2015, see European Commission Decision 2015/1470 (n 4) para 30; \textit{Micula v Romania} (n 22) para 64.
\textsuperscript{31} See European Commission Decision 2015/1470 (n 4) para 29.
\textsuperscript{32} See \textit{Micula v Romania} (n 22) paras 37, 52.
\textsuperscript{33} By contrast, the US District Court for the District of Columbia rejected the parallel effort of Viorel Micula to have the judgment confirmed there in a fast-track process, proposing a slower route to confirmation instead, see iareporter news item ‘Recent post-award developments in the Micula v Romania I case’ (10 September 2015) <www.iareporter.com> accessed 4 May 2016.
\textsuperscript{34} The judge declined to vacate her earlier \textit{ex parte} confirmation (see United States District Court of the Southern District of New York, \textit{Ioan Micula and Others v Romania}, Opinion and Order (5 August 2015) <http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2015mc00107/441267/766/> accessed 4 May 2016), and later declined Romania’s request to ‘reconsider’ that ruling, see United States District Court of the Southern District of New York, \textit{Ioan Micula and Others v Romania}, Opinion (9 September 2015) <http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2015mc00107/441267/82/> accessed 4 May 2016.
\textsuperscript{35} On 4 February 2016, the European Commission submitted an \textit{amicus curiae} submission in those proceedings, see European Commission, \textit{Brief for Amicus Curiae} (n 20).
\textsuperscript{36} The debate regarding the compatibility of EU provisions on State aid and payment of the award is not inherently linked to intra-EU BITs. For instance, if the Micula brothers had American rather than Swedish nationality and their claims had been brought under the Romania-US BIT, this would have raised the very same issues in an extra-EU situation. This also appears to be recognized by the European Commission, which refers to the Micula case and the ‘specific problems’ raised by State aid in a concept paper addressing its general investment policy, see European Commission Concept Paper ‘Investment in TTIP and beyond – the path for reform’ (5 May 2015) <http://trade.ec.europa.eu/docslib/docs/2015/may/tradoc_153408.PDF> accessed 4 May 2016, 5.
\textsuperscript{37} This question has only been mentioned in passing in the Micula proceedings, see eg European Commission Decision 2015/1470 (n 4) para 102.
In addition, it seems sensible to distinguish between enforcement in EU Member States and enforcement outside of the EU. This is because the relevance of any conflict between the enforcement of an award and EU law is likely to be assessed differently by the courts of an EU Member State and the courts of a State outside of the EU.

The combination of these two criteria leads to a matrix of four main scenarios that need to be considered when it comes to enforcing intra-EU BIT awards: (1) the enforcement of non-ICSID awards under the New York Convention within the EU; (2) the enforcement of non-ICSID awards under the New York Convention outside of the EU; (3) the enforcement of ICSID awards within the EU; and (4) the enforcement of ICSID awards outside of the EU.

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The subsequent analysis addresses these four scenarios in turn to consider how a potential conflict with EU law might play out in each of them.

2 Enforcement of non-ICSID awards under the New York Convention

The scenarios regarding the enforcement of non-ICSID awards under the New York Convention might be seen as presenting fewer difficulties than the scenarios involving the enforcement of ICSID awards.

2.1 Enforcement within the EU

Given that all EU Member States are signatories to the New York Convention, where enforcement of a non-ICSID award is being sought within the EU, the New York Convention will be applicable as long as the arbitral seat was within the territory of another signatory. An arbitral award will therefore have to be recognized and enforced in accordance with Article 3 of the New York Convention unless one of the grounds for refusing recognition and enforcement under Article 5 of the New York Convention applies.

In the context of enforcing intra-EU BIT awards, two of these grounds merit closer scrutiny. *First*, a State might invoke Article 5(1)(a) of the New York Convention, arguing that the tribunal did not have jurisdiction under the relevant
intra-EU BIT (1). \textsuperscript{38} Second, a State might try to resist enforcement on the basis of Article 5(2)(b) of the New York Convention, with the argument that enforcing the award would violate EU public policy (2). \textsuperscript{39} These two objections will be considered in turn, before addressing the procedure through which they would be decided (3).

2.1.1 Absence of jurisdiction under intra-EU BIT?

With regard to Article 5(1)(a) of the New York Convention, the argument would run that the tribunal had no jurisdiction to hear the dispute, since there never was a valid arbitration agreement in the first place. \textsuperscript{40} The European Commission in particular has long argued that intra-EU BITs have been ‘superseded’ by EU law with the accession of the relevant new Member States to the EU, due to their alleged incompatibility with EU law. \textsuperscript{41} In essence, these alleged incompatibilities relate to the more favourable treatment accorded to protected over non-protected investors, as well as to the unity of the EU legal system and its control by the ECJ. \textsuperscript{42}

As to the consequences of these alleged incompatibilities, it has been claimed that intra-EU BITs have implicitly been terminated upon accession under Article 59(1) VCLT. \textsuperscript{43} A more moderate view suggests that, even though the relevant BITs remain in force, provisions that are incompatible with EU law, including in particular those containing the investor-State dispute resolution mechanism, are no longer applicable in accordance with Article 30(3) VCLT. \textsuperscript{44} Whilst both positions have consistently been rejected by arbitral tribunals, \textsuperscript{45} the implicit termination argument is still being upheld by the Slovak Republic, \textsuperscript{46} and the European Commission maintains

\begin{itemize}
  \item Article 5(1)(a) of the New York Convention provides, in relevant part: ‘Recognition and enforcement of the award may be refused … if … the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.’ The absence of a valid arbitration agreement is therefore a ground for refusing recognition and enforcement under the New York Convention, see eg Patricia Nacimiento, ‘Article 5(1)(a)’ in Herbert Kronke and Others (eds), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer 2010) 220.
  \item In addition, the setting aside or suspension of enforcement at the seat of the arbitration might be a ground for refusing enforcement under Article 5(1)(c) of the New York Convention. Whilst the grounds for setting aside or suspending enforcement of a convention under national laws must remain beyond the scope of this contribution, the absence of a valid arbitration agreement and the violation of public policy would typically also be grounds for setting aside an award, see Article 34(2)(a)(i) and (b)(ii) of UNCITRAL Model Law on International Commercial Arbitration. See also OLG Frankfurt, 26 Sch 3/13, Decision (18 December 2014) <http://openjur.de/u/753594.html> accessed 4 May 2016, paras 48, 61; Steffen Hindelang, ‘Circumventing Primacy of EU Law and the CJEU’s Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration’, (2012) 39 Legal Issues of Economic Integration 179, 203.
  \item See eg the argument of the Slovak Republic in Oostergetel and Laurentius v Slovak Republic (n 3) para 63.
  \item For a detailed analysis in this regard see Wehland (n 2) 309-319. See also Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’ (2009) 46 Common Market Law Review 383, 400 et seq; Hindelang (n 39) 193 et seq.
  \item Article 59(1) VCLT provides: ‘A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.’
  \item Article 30(3) VCLT states: ‘When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.’
  \item See eg Eastern Sugar BV (Netherlands) v Czech Republic, UNCITRAL, Partial Award (27 March 2007) para 172; Oostergetel and Laurentius v Slovak Republic (n 3) para 74; Eureko v Slovak Republic (n 7) paras 265, 277; EURAM v Slovak Republic (n 6) paras 197, 236. See also OLG Frankfurt, 26 SchH 11/10, Decision (10 May 2012) <http://openjur.de/u/399128.html> accessed 4 May 2016; OLG Frankfurt, 26 Sch 3/13 (n 39) paras 52 et seq.
  \item See the arguments of the Slovak Republic in Oostergetel and Laurentius v Slovak Republic (n 3) para 66; Eureko v Slovak Republic (n 7) para 9. See also the arguments of the Czech Republic in Eastern Sugar v Czech Republic (n 45) para 94. It appears that this argument was also raised by the European Commission in the Micula annulment proceedings, see Micula v Romania (n 22) para 331.
\end{itemize}
that the dispute resolution provisions in intra-EU BITs have become inapplicable under Article 30(3) VCLT.\textsuperscript{47}

Without entering into this debate (which has been extensively addressed elsewhere\textsuperscript{48}), for purposes of the present discussion one can envisage two possibilities:

If (as held by all arbitral tribunals having considered the issue so far) there is no conflict between intra-EU BITs and EU law, or if the existence of such a conflict does not render the investor-State dispute resolution mechanism in the treaty inapplicable, then there usually will be a valid arbitration agreement. As a consequence, there will be no ground for refusing enforcement under Article 5(1)(a) of the New York Convention.

By contrast, if (following the view of some EU Member States and the European Commission) the investor-State dispute resolution mechanism in intra-EU BITs has become inapplicable, either pursuant to Article 59 or pursuant to Article 30(3) of the VCLT, then there never was an offer under the relevant treaty that the investor could accept and, as a consequence, no valid arbitration agreement. As a consequence, there will be a ground for refusing enforcement of an award under Article 5(1)(a) of the New York Convention.

It seems likely that sooner or later the EC\textsuperscript{49} will have its say on the alleged incompatibility of intra-EU BITs with EU law and the extent to which intra-EU BITs remain applicable.\textsuperscript{50} As the above considerations demonstrate, such a clarification would be helpful not only for drawing a line under the incompatibility debate (at least as far as the EU law perspective is concerned), but also for providing guidance to the courts of EU Member States on how to deal with the objection that a tribunal did not have jurisdiction under an intra-EU BIT in the context of enforcement proceedings under the New York Convention.

2.1.2 Violation of EU law as a violation of the ordre public of the Member State in which enforcement is being sought?

Another argument that might be raised where enforcement is being sought in the courts of an EU Member State is that enforcing the award might violate the EU’s ordre public and, by extension, the ordre public of the State of enforcement under Article 5(2)(b) of the New York Convention.\textsuperscript{51} To address this argument, it seems

\textsuperscript{47} See eg European Commission Amicus Curiae Brief (n 41) paras 20 et seq; argument of the European Commission in Micula v Romania (n 22) para 330.

\textsuperscript{48} For a discussion see eg Wehland (n 2) 303-306; Philip Strik, Shaping the Single European Market in the Field of Foreign Investment (Bloomsbury Publishing 2014) 213.

\textsuperscript{49} See below [–].

\textsuperscript{50} On 3 March 2016 the German Bundesgerichtshof decided to stay the proceedings regarding the annulment of the Eureko award pending before it and refer three questions regarding the compatibility of investor-State dispute resolution mechanisms in intra-EU BITs with specific provisions of EU law for a preliminary ruling under Article 267 TFEU to the CJEU, see Bundesgerichtshof, 1 ZB 2/15, Decision (3 March 2016) \texttt{http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgH&Art=en&Datum=Aktuell&Sort=12288&cur=74612&pos=14&anz=611} accessed 11 May 2016. A decision of the CJEU should be expected in 2017. Interestingly, whilst the argument that the dispute resolution clause in the Romania-Sweden BIT had become inapplicable either pursuant to Article 59(1) or pursuant to Article 30(3) VCLT and that the tribunal therefore lacked jurisdiction was raised by the European Commission in its amicus submission in the Micula annulment proceedings (see Micula v Romania (n 22) paras 330-334), the ad hoc committee gave this idea short shrift, simply noting that, ‘having reviewed the EC’s arguments and the Parties positions in response to the EC’s arguments’, it confirmed its conclusion not to annul the award, see Micula v Romania (n 22) para 339.

\textsuperscript{51} Article 5(2)(b) of the New York Convention states: ‘Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: … The recognition or enforcement of the award would be contrary to the public policy of that country.’
useful in a first step to consider under what circumstances EU law prohibits the enforcement of arbitral awards. In this regard, the approach taken by the ECJ in its *Eco Swiss* decision rendered in 1999 may provide some guidance.

In *Eco Swiss* the Court had to consider a provision of EU competition law prohibiting certain restrictive agreements between companies, and the effect of a violation of this provision in annulment proceedings brought against an arbitral award in the courts of an EU Member State.52 The Court started by highlighting that:

> [I]t is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.53

However, it then pointed out that such exceptional circumstances might exist where ‘a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market’ would be at issue.54 According to the Court, this was precisely the case with regard to the provision of competition law under consideration.

The Court therefore appeared to suggest that EU law generally accepts even the enforcement of arbitral awards that are based on an erroneous application of EU law, as long as such enforcement does not go against a ‘fundamental provision … essential for the accomplishment of the tasks entrusted to the Community.’55 Interestingly enough, the Court added that its findings were compatible with the obligations of the Member States under the New York Convention, since the need to observe ‘a fundamental provision’ of EU law could also be regarded as a matter of public policy within the meaning of that Convention.56 As a consequence, it would appear that where enforcement of an award goes against a ‘fundamental provision’ of EU law, it will also breach EU public policy.57

At the same time, there is little indication as to what provisions of EU law might be ‘fundamental’ enough to justify not enforcing an award.58 In particular, to answer the question of whether enforcing an intra-EU BIT award might violate a fundamental EU law provision because the underlying BIT is incompatible with EU law, one would certainly have to look very closely at the exact extent of the alleged incompatibilities.59

The situation is arguably clearer with regard to a violation of Article 107 of the TFEU, the provision at issue in the *Micula* proceedings. As mentioned earlier, the European Commission is arguing that enforcing an award must be considered State aid where the award provides for the payment of damages based on a host State

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52 The rule at issue was what is now Article 101 TFEU (back then Article 81 TEC).
53 See *Case C-126/97 Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055 para 35. See also *Case C-168/05, Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421 para 34.
54 See *Eco Swiss v Benetton* (n 53) para 36.
55 For an apparently different view, arguing that the ‘substantive matters covered by the underlying BIT are covered by E.U. law’ and that, therefore, the award would be ‘illegal and unenforceable under E.U. law’, see European Commission, Brief for Amicus Curiae (n 20) 10.
56 See *Eco Swiss v Benetton* (n 53) paras 38-39.
57 See *Eco Swiss v Benetton* (n 53) para 39. See also Eilmansberger (n 42) 428.
58 The ECJ seemed to take the view that a similar status would have to be recognized for EU provisions on consumer protection, see *Mostaza Claro v Centro Móvil* (n 53) para 37. With regard to the difficulty of applying the standard see also Jürgen Basedow, ‘EU Law in International Arbitration: Referrals to the European Court of Justice’, (2015) 32 Journal of International Arbitration 367, 372.
59 As mentioned earlier, this discussion must remain beyond the scope of the present contribution, see above [--]. For a detailed analysis see Wehland (n 2) 309-319.
measure that was itself necessary to avoid an infringement of EU State aid rules.\(^60\) According to the European Commission, if such an award were to be enforced, this would be tantamount to indirectly giving effect to the illegal State aid that the host State measure was precisely meant to avoid.\(^61\)

Without assessing whether this view is correct and whether enforcement of the *Micula* award would indeed breach Article 107 of the TFEU,\(^62\) given the role of Article 107 as a central provision of EU competition law it certainly is not implausible to regard it as ‘a fundamental provision which is essential ... for the functioning of the internal market.’ Where enforcement of an award would lead to a violation of Article 107 TFEU, therefore, the *Eco Swiss* decision indicates not only that EU law would not permit enforcing the award, but also that enforcement would be in violation of EU public policy.

2.1.3 Applicable procedure

In terms of procedure, an objection based on Article 5(1)(a) or Article 5(2)(b) of the New York Convention would have to be considered by the courts of the Member State dealing with the application to recognize and enforce the relevant intra-EU BIT award. Since each of these grounds might be seen as raising questions of EU law that have not yet been addressed with sufficient clarity by the ECJ, one would expect the Member State’s courts to stay the proceedings before them and refer these questions to the ECJ for a preliminary ruling under Article 267 of the TFEU.\(^63\) As a consequence, the ECJ is likely to have the last word in this scenario.

2.2 Enforcement outside of the EU

How does the above analysis change where enforcement of an intra-EU non-ICSID award is being sought outside of the EU? The objection based on Article 5(1)(a) of the New York Convention and the argument that there is no arbitration

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60 See above [–]. See also Tietje/Wackernagel (n 5) 222; Christian Tietje and Clemens Wackernagel, ‘Outlawing Compliance? – The Enforcement of intra-EU Investment Awards and EU State Aid Law’ (2014) 11 Transnational Dispute Management 1, 7.
61 The claimants in the Micula case argued against this view, see *Micula v Romania* (n 9) para 338. In any event, the claimants in that case took the view that the incriminated measures of the respondent were not required by the EU’s provisions on state aid, since Romania had at the relevant point in time not yet acceded to the EU, see *Micula v Romania* (n 9) para 339. With regard to the European Commission’s view to the contrary see European Commission, Letter to Romania (n 21) para 59; European Commission Decision 2015/1470 (n 4) para 134.
62 See European Commission Decision 2015/1470 (n 4) para 104. See also Opinion of AG Ruiz-Jarabo Colomer (28 April 2005) in Joined Cases C-346/03 and C-529/03, Giuseppe Atzeni and Others, and Marco Scalas and Renato Lilliu v Regione autonoma della Sardegna Atzeni [2006] ECR I-1875 para 198; Tietje/Wackernagel (n 5) 222.
63 It seems clear that the simple payment of an arbitral award by a respondent State in the absence of any violation of EU law on State aid in the award itself cannot be regarded as State aid. As pointed out by the ECJ in its *Asteris* decision, ‘State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals’,Joined Cases C-106/87 to 120/87, *Asteris* AE and Others v Hellenic Republic and European Economic Community [1988] ECR 5515 para 23. The same must in principle also be true for the enforcement of an arbitral award through the courts of a third State where enforcement is mandated by the provisions of the New York Convention. See also Tietje/Wackernagel (n 5) 221; Tietje/Wackernagel (n 60) 6.
64 Article 267 TFEU provides, in relevant part: ‘The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.’ In the absence of a referral under Article 267, if the relevant Member State were to enforce the award, the European Commission might institute infringement proceedings under Article 258 of the TFEU against that State, see also Eilmansberger (n 42) 427.
agreement stays exactly the same. By contrast, any considerations based on a possible violation of EU public policy should not be relevant in this scenario.\textsuperscript{64}

In addition, in terms of procedure, there is no way for the ECJ to become involved in an extra-EU situation. Whilst the European Commission might seek to intervene in enforcement proceedings outside of the EU (as it has done in the \textit{Micula} case),\textsuperscript{65} the courts of the enforcing State do not have the possibility to seek a preliminary ruling from the ECJ.\textsuperscript{66} As a consequence, the final word on any objections to enforcement based on EU law in this scenario will be with the national courts of the enforcing State.

3 Enforcement of ICSID awards

When it comes to enforcing ICSID awards, the situation is different in that the ICSID Convention itself contains provisions on enforcement in Articles 54 and 55. In particular, Article 54(1) of the ICSID Convention states in relevant part that ‘[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.’\textsuperscript{67} It is largely agreed that this means that the courts of an ICSID Signatory cannot review the question of whether an ICSID tribunal exceeded its jurisdiction, nor can an ICSID Signatory invoke its \textit{ordre public} to avoid enforcing a damages award rendered under the ICSID Convention.\textsuperscript{68}

3.1 Enforcement within the EU

Where enforcement of an ICSID award is being sought in an EU Member State other than Poland (which is not a signatory to the ICSID Convention), the starting point for the relevant court will be Article 54 of the ICSID Convention.\textsuperscript{69} Bearing in mind that the provision does not leave any room for review by the enforcing court, there is a question as to what happens where enforcing an award under Article 54 would lead to a violation of EU law. This question can be assessed either from an EU law perspective (1) or from a public international law perspective (2). In any event, it is necessary to identify the situations in which a violation of EU law exists (3).

\textsuperscript{64} With regard to the argument that the payment of damages in contravention of EU law would force a respondent State to breach its international obligations and that this would constitute a violation of the principle of \textit{pacta sunt servanda} as part of Swiss public policy see \textit{Swiss Federal Tribunal, Republic of Hungary v EDF International}, Decision (6 October 2015) <http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims> accessed 4 May 2016, para 5.3.1.
\textsuperscript{65} See iareporter news item of 10 September 2015 (n 33).
\textsuperscript{66} Article 267 TFEU only refers to courts and tribunals ‘of a Member State.’
\textsuperscript{67} Article 54(3) ICSID adds that: ‘Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.’ Article 55 ICSID specifies that: ‘Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.’
\textsuperscript{68} See eg Edward Baldwin, Mark Kantor, and Michael Nolan, ‘Limits to Enforcement of ICSID Awards’ (2006) 23 Journal of International Arbitration 1, 4; Tietje/Wackernagel (n 5) 210. Article 54 ICSID does not apply to the enforcement of non-pecuniary obligations. As a consequence, where an ICSID award contains an obligation for specific performance, this obligation will usually have to be enforced in accordance with the provisions of the New York Convention, see Christoph Schreuer, \textit{The ICSID Convention} (2nd ed CUP 2009) Article 54, paras 5, 20.
\textsuperscript{69} Poland is the only Member State of the EU that is not a signatory to the ICSID Convention. As a consequence, enforcement of an ICSID award in Poland would likely have to be carried out in accordance with the provisions of the New York Convention, see Schreuer (n 68) paras 5, 20.
3.1.1 The EU law perspective

From an EU law perspective, where enforcement of an award under Article 54 of the ICSID Convention would lead to a violation of EU law, the provision should not be applied in accordance with the principle of supremacy of EU law. This principle is based on a long line of decisions of the ECJ to the effect that EU law takes precedence over the internal legislation of EU Member States and that the latter cannot be applied where there is a conflict between the two.

In particular, the ECJ has consistently held that EU law takes precedence in the event of a conflict with a pre-accession treaty concluded between EU Member States, and that this must be the case even where the relevant pre-accession treaty includes non-EU signatories, as far as the relations between EU Member States are concerned. There also can be no question of the ICSID Convention forming part of the EU legal order, given that the EU is not a signatory to the Convention, and neither are all of its Member States.

As a consequence, it would not be surprising if an EU court were to conclude that it was prevented from applying Article 54 of the ICSID Convention where enforcement of an award would be incompatible with EU law. Whilst the court of first instance in the Micula enforcement proceedings in Romania apparently did not enter into any considerations in this regard, the Bucharest Court of Appeal subsequently stayed the proceedings before it pending a final decision on the enforceability of the award. It also appears that in January 2016 the court of first instance in Brussels held that the Micula award was unenforceable in Belgium.

If the court of an EU Member State had any doubts regarding the enforceability of an award under Article 54 of the ICSID Convention due to a possible conflict with EU law and there were no further recourse against that court’s decision under national law, one would expect the court to refer the matter for a preliminary ruling to the ECJ.

76 See the argument of the European Commission in Micula v Romania (n 9) para 334. Similarly, in its amicus submission in the proceedings before the US Court of Appeals for the Second Circuit, the European Commission argued that its decision regarding the State aid character of any payment of the award constitutes secondary EU legislation, adopted on the basis of TFEU Articles 107(1) and 109(2), that binds Romania and has primacy over any obligations Romania has under its domestic law, including obligations that flow from any international treaties, see European Commission, Brief for Amicus Curiae (n 20) 35. See also the argument of the European Commission in Electrabel v Hungary (n 5) para 4.110.

77 See Costa v ENEL (n 8). See also Hindelang (n 39) 187.


79 Article 351 TFEU provides that the ‘rights and obligations arising from agreements concluded … before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.’ However, Article 351 can only be relevant with regard to obligations of an EU Member State towards a third State and does not apply as between EU Member States, see Case C-124/95, The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England [1997] ECR I-181; Case C-264/09, Commission v Slovak Republic [2011] ECR I-8065, para 41. See also European Commission Decision 2015/1470 (n 4) para 129; Tietje/Wackernagel (n 5) 210; Strik (n 48) 216. For a different view see Nikos Lavranos, ‘Interference of the European Commission in the Enforcement of Arbitration Awards: The Micula Case’ <http://www.globalinvestmentprotection.com/index.php/interference-of-the-european-commission-in-the-enforcement-of-arbitration-awards-the-micula-case/> accessed 4 May 2016.

80 This was also pointed out by the European Commission in the Micula proceedings, see Micula v Romania (n 9) para 336. 81 As mentioned, Poland is the exception in this regard, see above [–]. See also Tietje/Wackernagel (n 5) 214.

82 The consequence of such a conclusion would be to look at other enforcement regimes, in particular that under the New York Convention. In this regard, reference can be made to the analysis above [–].

83 See European Commission, Letter to Romania (n 21) para 21; European Commission Decision 2015/1470 (n 4) para 32.
84 See Micula v Romania (n 22) para 73.
85 See European Commission, Brief for Amicus Curiae (n 20) 11, 16.
86 See also the statement of the European Commission in the Micula arbitration to the effect that ‘if a national court in the EU were asked to enforce an ICSID award that is contrary to EU law and EU state aid policy rules, the proceedings would have to be
3.1.2 The public international law perspective

Whilst the EU law perspective corresponds to the position that one would expect the courts of an EU Member State to adopt, it might provide additional comfort if this perspective could also be reconciled with the perspective of international law. In this regard, one might consider looking at Article 30 of the VCLT, which deals with the application of successive treaties relating to the same subject-matter.\(^81\) However, given the very different scope and purpose of the ICSID Convention on the one hand and the European treaties on the other, there is a serious question as to whether these instruments can be considered to relate to the same subject-matter and whether Article 30 is therefore applicable.\(^82\)

The question can arguably be left open, since Article 30 VCLT should, in any event, be inapplicable in this case due to the agreement between EU Member States that the European treaties take precedence over conflicting provisions in other international agreements to which they are parties – including the ICSID Convention.\(^83\) Where the signatories to successive treaties have specifically agreed for one of those treaties to take precedence, this agreement must be given effect, irrespective of any temporal rule that might otherwise be applicable under Article 30 VCLT.\(^84\) Whilst the European treaties do not contain an explicit conflict clause, they have consistently been applied to the effect that EU law takes precedence over conflicting treaty obligations as between EU Member States,\(^85\) and this application must be taken into account as part of the relevant context when interpreting the European treaties under Article 31 of the VCLT.\(^86\)

Where enforcement of an intra-EU BIT award is being sought within the EU, all of the States concerned are EU Member States.\(^87\) In such a case, international law requires the application of the conflict rule that these States have agreed on amongst themselves with regard to the relationship between the European treaties and the ICSID Convention.\(^88\) The outcome reached from the EU law perspective in the event

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\(^{81}\) See eg Tietje/Wackernagel (n 5) 217.

\(^{82}\) See example 31(1) VCLT (‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’) and 31(3)(b) VCLT (‘There shall be taken into account, together with the context: … any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’) and 31(3)(b) VCLT (‘There shall be taken into account, together with the context: … any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’).

\(^{83}\) See also Koskenniemi (n 82) paras 252, 323; Kerstin Odendahl, ‘Article 30: application of successive treaties relating to the same subject matter’ in Oliver Dörr and Kirsten Schmalenbach (eds), _Vienna Convention on the Law of Treaties: A Commentary_ (Springer 2012) 505, paras 16-17.

\(^{84}\) See above [—]. Differently, Hindelang and Tietje/Wackernagel appear to assume that an implied priority clause in the European treaties would lead to the application of Article 30(2) VCLT, see Hindelang (n 39) 187; Tietje/Wackernagel (n 5) 219.

\(^{85}\) See also Koskenniemi (n 82) para 283; Wehland (n 2) 305; Hindelang (n 39) 187; Tietje/Wackernagel (n 5) 218.

\(^{86}\) These are the home State of the investor, the respondent host State, and (potentially differently) the State in which enforcement is being sought.

\(^{87}\) It should be noted that, even if Article 30 VCLT were applicable and the European treaties did not contain an implicit conflict clause, the result pursuant to the temporal rule contained in Article 30 VCLT would be the same. Since the parties to the later treaty (the TFEU) do not include all the parties to the earlier treaty (the ICSID Convention), but all the States concerned in the
of a conflict between Article 54 of the ICSID Convention and EU law should therefore indeed be compatible with the international law perspective.

3.1.3 When does enforcement of an intra-EU BIT award breach EU law?

This still leaves open the question of when enforcement of an intra-EU BIT award would lead to a violation of EU law. But this question has already been considered in the context of non-ICSID awards, and the considerations highlighted in that context must also apply in this scenario. As detailed, the reasoning of the ECJ in *Eco Swiss* suggests that it is only in cases where enforcement would go against a ‘fundamental provision … essential for the accomplishment of the tasks entrusted to the Community’ that an award should not be enforced.

As a consequence, a breach of Article 107 of the TFEU might well be a sufficient ground for not enforcing an award under Article 54 of the ICSID Convention. By contrast, it is much less clear that the mere intra-EU BIT character of an award should have the same effect. Even assuming that there is a conflict between intra-EU BITs and EU law, one would have to carefully look at the extent of this conflict to ascertain whether it affects a ‘fundamental provision’ of EU law.

3.2 Enforcement outside of the EU

Where enforcement of an ICSID award is being sought outside of the EU, the situation is of course different again. In that case, the courts of the State of enforcement will not consider themselves bound to accord supremacy to EU law, and there cannot be any question of the EU treaties taking precedence due to an implicit conflict clause, because the enforcing State is not a signatory to those treaties. As a consequence, any potential incompatibility with EU law would most likely be irrelevant.

Where enforcement is being sought in another ICSID Signatory, the courts of the enforcing State will rather have to apply Article 54 of the ICSID Convention and enforce the award, subject only to that State’s domestic laws on State immunity. This would seem to correspond to the approach taken by the US District Court for the Southern District of New York in the *Micula* case.

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89 See above [—].
90 See above [—].
91 See above [—].
92 The existence of such a conflict seems doubtful, see Wehland (n 3) 319.
93 See above [—].
94 See above [—].
95 See above [—].
96 In the appeal proceedings before the United States Court of Appeals for the Second Circuit, the European Commission is arguing that the ‘district court’s ruling will inflict injury upon the European Union that the international comity, act of state, and foreign sovereign compulsion doctrines are designed to avoid’, see European Commission, Brief for Amicus Curiae (n 20) 16. An assessment of these doctrines as a matter of US law must remain beyond the scope of this contribution.
97 With regard to the enforcement in States that are not signatories to the ICSID Convention, the considerations regarding enforcement under the New York Convention will typically apply, see above [—].
98 See *Micula v Romania*, Opinion and Order (5 August 2015) (n 34) 7.
4 Conclusion

In sum, the enforcement of intra-EU BIT awards must follow different rules depending on whether enforcement is being sought inside or outside of the EU, and also differentiate between ICSID and non-ICSID awards.

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Within the EU, even the enforcement of ICSID awards cannot be entirely taken for granted where such enforcement would lead to the violation of a fundamental provision of EU law. Outside of the EU, a violation of EU law will usually not be relevant – subject to the caveat that with regard to non-ICSID awards, the inapplicability of intra-EU BITs (as argued by the European Commission) would be a ground for refusing enforcement under Article 5(1)(a) of the New York Convention.

The future developments in the *Micula* enforcement proceedings as well as in the proceedings before the European Courts should be observed closely. In the meantime, investors concerned about a potential impact of EU law on their rights under intra-EU BITs will be well advised to seek arbitration under the ICSID Convention and enforce their awards outside of the EU.